

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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**MAR 12 1999**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of:

CS Docket No. 98-54

**1998 Biennial Regulatory Review – Part 76  
Cable Television Service Pleading and  
Complaint Rules**

**PETITION FOR RECONSIDERATION**

EchoStar Communications Corporation (“EchoStar”), pursuant to 47 C.F.R.

§ 1.429, petitions for reconsideration of the Commission’s Report and Order<sup>1</sup> in the above-referenced proceeding.<sup>2</sup> Specifically, the Report and Order amended the Commission’s statute of limitation rules for Part 76 cable television service complaints without providing notice of or an opportunity for comment on the amendments, in violation of Section 4(b) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(b).

In the Report and Order, the Commission stated:

We adopt a procedural amendment clarifying essentially similar provisions related to the one-year limitations period for filing program access program access, program carriage and open video

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<sup>1</sup> 1998 Biennial Review – Part 76 Cable Television Service Pleading and Complaint Rules, Report and Order, CS Dkt. No. 98-54, FCC 98-348 (Jan. 8, 1999) (“Report and Order”).

<sup>2</sup> This petition for reconsideration is timely under 47 C.F.R. §§ 1.4(b)(1), 1.429(d), because it is being filed within 30 days of publication of a summary of the Report and Order in the Federal Register. See 1998 Biennial Review – Part 76 Cable Television Service Pleading and Complaint Rules, 64 Fed. Reg. 6565 (Feb. 10, 1999). EchoStar is a direct broadcast satellite service provider and multichannel video programming distributor, and is therefore an interested person entitled to submit this petition for reconsideration. See 47 C.F.R. § 1.429(a).

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system complaints. The impetus for this amendment is the Bureau's recent decision dismissing as time-barred a program access complaint . . . .<sup>3</sup>

This amendment to the Part 76 statute of limitations effects a significant change in the rules that was not addressed in the notice of proposed rulemaking (the "NPRM") that led to the Report and Order.<sup>4</sup>

Before the Report and Order, the program access statute of limitation rules permitted a complaint to be filed within one year of the time that

[t]he satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart . . . .<sup>5</sup>

After the Commission's amendment, the corresponding provision permits a complaint within one year of the time that

[t]he satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, ***and such offer to sell programming is unrelated to any existing contract between the complainant and the satellite cable programming or satellite broadcast programming vendor . . . .***<sup>6</sup>

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<sup>3</sup> Report and Order, ¶ 18 (citing EchoStar complaint against Fox / Liberty Networks et al.).

<sup>4</sup> 1998 Biennial Review – Part 76 Cable Television Service Pleading and Complaint Rules, Notice of Proposed Rulemaking, 13 FCC Rcd. 10644 (1998) ("NPRM").

<sup>5</sup> 47 C.F.R. § 76.1003(r)(2) (1998).

<sup>6</sup> 47 C.F.R. § 76.1003(f)(2) (emphasis added). The Commission made identical amendments to the other Part 76 statute of limitations rules. See 47 C.F.R. §§ 76.1302(e)(2), 76.1513(g)(2).

The highlighted language added by the Report and Order places a major new limitation on program access complaints by multichannel video programming distributors that have existing contracts with distributors of satellite cable programming or satellite broadcast programming.

This significant change to the Commission's program access rules is inconsistent with the APA because the change was not in any way addressed in the NPRM. Indeed, the NPRM did not provide notice of any remotely similar change to the Commission's rules. The only subject of the NPRM was "simplification of the complaint processes for Part 76 rules by instituting a uniform system" in place of the widely varying Part 76 procedures that previously existed.<sup>7</sup> Nowhere did the NPRM state an intention to address substantive issues like the relevant statute of limitations,<sup>8</sup> and, naturally, no party to the proceedings on the NPRM commented on the statutes of limitations provisions that the Commission amended.<sup>9</sup> Indeed, the Report and Order explicitly recognizes that "[t]he impetus for th[e] amendment is the Bureau's recent decision dismissing as time-barred a program access complaint,"<sup>10</sup> rather than the NPRM or comments received in response to the NPRM.

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<sup>7</sup> NPRM, 13 FCC Rcd. at 10645.

<sup>8</sup> Under consistent court decisions, the applicable statute of limitations is a substantive, not procedural, issue. See, e.g., A.I. Trade Fin. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1458 (D.C. Cir. 1995) (citing Guaranty Trust Co. v. York, 326 U.S. 99 (1945)); Gersman v. Group Health Ass'n, 975 F.2d 886, 903 (1992).

<sup>9</sup> See Report and Order, ¶ 18.

<sup>10</sup> Id. The exact issue resolved by the Commission's amendment to the statute of limitations provision is currently at issue on a petition for reconsideration filed by EchoStar from the denial of its program access complaint. See Petition of EchoStar Communications Corporation for Reconsideration, File No. CSR-5138 P (Nov. 27, 1998).

The lack of relationship between the NPRM and the statute of limitations amendment in the Report and Order is particularly clear from the Commission's statement that its change to the statute of limitation rules was "a procedural amendment *clarifying essentially similar provisions* related to the one-year limitations period ... ." <sup>11</sup> This language is apparently intended to relate the Commission's decision to the request in the NPRM for "comment on which aspects of the pleading processes can be made consistent ...; or alternatively, which pleading processes are similar and should have similar procedures." <sup>12</sup> However, there is no basis on which any member of the public could have supposed that this request for comment related to the statute of limitations provisions, because the three Part 76 statute of limitations provisions that the Commission changed were *already substantively identical*. <sup>13</sup> Thus, there was no need for harmonization of the provisions, and the Commission in fact made identical changes to each provision. <sup>14</sup>

The Commission's amendment of the statute of limitations rules without notice in the NPRM and opportunity for comment is flatly inconsistent with Section 4(b) of the APA, which requires that notice be given of "either the terms or substance of the proposed rule or a

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<sup>11</sup> Report and Order, ¶ 18 (emphasis added).

<sup>12</sup> NPRM, 13 FCC Rcd. at 10646.

<sup>13</sup> See 47 C.F.R. §§ 76.1003(r)(2) (1998), 76.1302(r)(2) (1998), 76.1513(t)(2) (1998).

<sup>14</sup> See 47 C.F.R. §§ 76.1003(f)(2), 76.1302(e)(2), 76.1513(g)(2). Nor is the change to the statute of limitations rule properly described as a "clarification." See Report and Order, ¶ 18. On its face, the change narrows the category of events that triggers the statute of limitations, from all offers to only those offers that are unrelated to an underlying contract.

description of the subjects and issues involved.”<sup>15</sup> The D.C. Circuit has found that this provision “requires the Commission to provide notice of a proposed rulemaking ‘adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.’”<sup>16</sup> The Commission manifestly failed to satisfy these standards in the present case, in which the NPRM sought comment on harmonization of *inconsistent, procedural* provisions of the Part 76 rules, and the Report and Order also amended the *consistent, substantive* provisions of the rules relating to the applicable statute of limitations.

Similarly, the Commission’s amendment to the Part 76 statute of limitation rules does not satisfy the APA as a “logical outgrowth” of the proposals in the NPRM.<sup>17</sup> This test is satisfied only if “[a] party, ex ante, should have anticipated that such a requirement might be imposed.”<sup>18</sup> For the reasons stated above, there was simply no basis in the NPRM for a party to conclude that the Commission in the Report and Order would amend the statute of limitations provisions of the Part 76 rules.

In sum, the APA requires the Commission to rescind its amendments in the Report and Order to the statute of limitations provisions of the Part 76 rules, pending a notice

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<sup>15</sup> 5 U.S.C. § 533(b); see also Provision of Aeronautical Services via the Inmarsat System, 11 FCC Rcd. 5330, 5332 (1996) (“Aeronautical Order”) (applying § 533(b) to invalidate Commission decision).

<sup>16</sup> MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995) (quoting Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988)).

<sup>17</sup> See Aeronautical Order, 11 FCC Rcd. at 5332; Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

<sup>18</sup> Aeronautical Radio, 928 F.2d at 446 (quoting Small Refiner Lead Phase-Down Task Force v. U.S. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)).

and comment rulemaking proceeding in which such amendments can be properly considered in a manner consistent with the APA.

Respectfully submitted,

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Dated: March 12, 1999

### **CERTIFICATE OF SERVICE**

I, Christine A. Delp, hereby certify that the foregoing Petition for Reconsideration was served this 12th day of March 1999, by hand delivery on the following:

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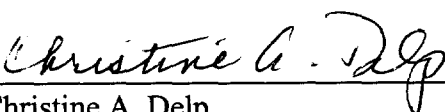
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